

STATEMENT OF SCOPE

Department of Workforce Development

Rule No:

DWD 131

Relating to:

Pre-Employment Drug Testing

Rule Type

Emergency

Finding/nature of emergency

Under 2015 Wis. Act 55 § 9151(5)(b), no finding of emergency is required.

Detailed Description of the Objective of the Proposed Rule

The emergency rule will create ch. DWD 131 relating to pre-employment drug testing for unemployment insurance benefit claimants. The emergency rule will establish guidelines that may disqualify benefit claimants who refuse to take a pre-employment drug test, or who fail a pre-employment drug test and choose not to participate in a substance abuse treatment program. The emergency rule will provide that refusing to take a pre-employment drug test, or failing a pre-employment drug test and choosing not to participate in a drug rehabilitation program, may amount to the refusal of suitable work and cause ineligibility for unemployment benefits.

Description of Existing Policies Relevant to the Rule, New Policies Proposed to be Included in the Rule, and an Analysis of Policy Alternatives

No existing policies are related to the emergency rule. The emergency rule will implement the requirements specified under Act 55, relating to pre-employment drug testing, substance abuse treatment program and job skills assessment. Act 55 created Wis. Stat. § 108.04 (8) (b), which provides the following:

- There is a rebuttable presumption that an individual failed, without good cause, to accept suitable work if DWD determines, based on a report submitted by an employing unit, that an employing unit required the individual to submit to a test for the presence of controlled substances as a conditional offer of employment and withdrew the conditional offer after the individual declined to submit to the test, or tested positive for one or more controlled substances without providing evidence of a valid prescription for each controlled substance.

- For an individual who declines to submit to a test, the individual shall be ineligible for benefits until the individual qualifies for benefits in accordance with the rules promulgated by DWD.

- For an individual who tests positive for the presence of controlled substances without providing evidence of a valid prescription, the individual shall be ineligible for benefits until the individual qualifies for benefits in accordance with the rules promulgated by DWD or the individual may maintain eligibility for benefits if the individual enrolls in and complies with the requirements of a substance abuse treatment program and completes a job skills assessment.

In addition, Act 55 provides that DWD shall:

- Create and provide a substance abuse treatment program for individuals who engage in the unlawful use of controlled substances.
- Specify criteria that a claimant must satisfy in order to be considered in full compliance with the substance abuse treatment program.
- Create and provide a job skills assessment for claimants who engage in the unlawful use of controlled substances.
- Identify criteria that an individual must satisfy to be considered in full compliance with the requirements of the job skills assessment.

The emergency rule will implement the requirements specified under Act 55 and create a process for an employing unit to voluntarily submit the positive results of a test conducted on an individual to DWD, if the following requirements are satisfied: the test was required as a condition of an offer of employment; the individual was informed that the results may be submitted to DWD; the test was conducted or confirmed by a laboratory certified by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services; and the individual tested positive for one or more controlled substances without evidence of a valid prescription. DWD is relying on standards enforced by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services to ensure that prescription information is collected and evaluated by the laboratory and presented in the laboratory report. In addition, the emergency rule will identify the process by which the employing unit may report the positive results of a test to DWD.

An employing unit may voluntarily notify DWD that an individual declined to submit to a test for the presence of controlled substances as a condition of an offer of employment and the individual was informed before testing, that the employing unit may notify DWD if the individual declined to submit to the test.

When an employing unit submits a report showing a failed or refused pre-employment drug test, DWD shall determine whether the individual who failed or refused the test is receiving unemployment insurance benefits. If DWD determines that the individual is receiving unemployment insurance benefits, there is a rebuttable presumption that the individual failed to accept suitable work. The emergency rule will provide that the individual may overcome the presumption by proving certain facts by a preponderance of the evidence.

An individual who fails a pre-employment drug test without presenting evidence of a valid prescription or declines to submit to a test is ineligible for benefits. The emergency rule will provide the requalification requirements an individual who fails a pre-employment drug test or declines to submit to a test, must meet to obtain benefits.

An individual who tests positive for controlled substances without presenting evidence of a valid prescription may maintain benefit eligibility by enrolling in and complying with a substance abuse treatment program, and completing a job skills assessment.

The emergency rule will also identify the parameters for a substance abuse treatment program for individuals who test positive for the presence of one or more controlled substances (without a valid prescription). In addition, the emergency rule may do all of the following:

- Require an individual to schedule an assessment with a substance abuse treatment provider within 5 working days as directed by DWD.
- Require an individual to comply with all conditions of a treatment plan developed by a substance abuse treatment provider.
- Specify that the substance abuse treatment provider will determine if an individual is in compliance with the substance abuse treatment program requirements, and inform DWD on a weekly basis of the individual's compliance.
- Provide that DWD will pay the reasonable costs associated with the substance abuse treatment plan requirements for each week that the individual is otherwise eligible for unemployment insurance benefits under Chapter 108.
- Require an individual to complete a job skills assessment as directed by DWD.

The substance abuse treatment and job skills assessment provisions under this chapter only apply to circumstances of pre-employment drug testing.

The policy alternative is to do nothing. If the department does not promulgate the emergency rule, there will be no treatment available for individuals who fail a pre-employment drug test and choose to participate and comply with a substance abuse treatment program. In addition, there will be no ramifications for an individual who declines to take a pre-employment drug test.

Detailed explanation of statutory authority for the rule, including the statutory citation and language

Section 108.04 (8) (b), Stats.

“[t]he department shall promulgate rules identifying a period of ineligibility that must elapse or a requalification requirement that must be satisfied, or both, in order for an employee who becomes ineligible for benefits as provided in this paragraph to again qualify for benefits and specifying how a claimant may overcome the presumption in this paragraph.”

Section 108.133(4) (b), Stats.

“The department shall promulgate rules necessary to implement par. (a).”

Section 108.14 (2), Stats.

“[t]he department may adopt and enforce all rules which it finds necessary or suitable to carry out this chapter.”

Estimate of amount of time that state employees will spend developing the rule and other resources necessary to develop the rule

The total amount of staff time is estimated to be approximately 60 hours.

List with description of all entities that may be affected by the proposed rule

The emergency rule may affect individuals who collect unemployment insurance benefits and either refuse to take, or fail, a drug test that is required by employers as a conditional offer of employment. The emergency rule may also affect employers as unemployed individuals may collect fewer unemployment insurance benefits, resulting in fewer charges to employers' unemployment insurance accounts and employers possibly paying less unemployment insurance tax.

Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule

There are no existing or proposed federal regulations relating to pre-employment drug testing. There are federal recommendations relating to approved procedures for the collection and evaluation of drug tests.

Anticipated economic impact of implementing the rule (note if the rule is likely to have an economic impact on small businesses)

The emergency rule will have a positive effect on businesses, including small businesses. This would occur if a claimant is found to have refused an offer of suitable work under the provisions of the rule, which would reduce the amount of unemployment benefits charged to an employer's unemployment insurance account.

Contact Person: Janell Knutson, Director, UI Bureau of Legal Affairs, (608) 266-1639, janell.knutson@dwd.wisconsin.gov.

Approval by signature of the agency head or authorized individual